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**IN THE SUPREME COURT OF THE STATE OF MONTANA**

**Cause No.: DA-09-0510**

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STATE OF MONTANA, EX REL. DEPARTMENT  
OF ENVIRONMENTAL QUALITY,

Plaintiff and Appellant,

v.

BNSF RAILWAY COMPANY,

Defendant and Appellee and Cross Appellant

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**FILED**

SEP 28 2009

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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**NOTICE OF CROSS-APPEAL**

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On Appeal from the First Judicial District Court, Lewis and Clark County  
The Honorable Jeffrey M. Sherlock, Presiding  
District Court Cause No. BDV 2004 -596

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**Appearances:**

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NOTICE is given that BNSF Railway Co. (“BNSF”), the Cross-Appellant above-named and who is the Defendant in that cause of action filed in the First Judicial District, in and for the County of Lewis and Clark, as Cause No. BDV -2004-596, hereby cross-appeals to the Supreme Court of the State of Montana from the August 13, 2009, Final Unified Order of Abatement and various intermediate orders entered prior to that date as follows:

1. The trial court’s determinations (February 10, 2009 Findings of Fact, Conclusions of Law, and Order; November 5, 2007 Order on Various Motions) relating to BNSF’s assertion and establishment of the third-party defense codified at Mont. Code Ann. § 75-10-715(5)(c)(i);

2. The absence of any findings or conclusions in the Final Unified Order (August 13, 2009) relating to the reduction of BNSF's total percentage of liability by the percentage amounts allocated to settling parties in the various court-approved consent decrees;

3. Whether the trial court's approval of the Montana Department of Environmental Quality's ("DEQ") proposed consent decrees with non-parties Montana Mokko, Stillwater Forest Products and Robert Parmenter (March 7, 2008 Order Approving Consent Decrees Between DEQ and Defendants Kalispell Pole and Timber, Montana Mokko, Stillwater Forest Products, and Robert Parmenter) complies with Mont. Code Ann. § 75-10-719;

4. Whether the trial court erred in issuing an abatement order (November 5, 2007 Order on Various Motions) on the KPT site pursuant to Mont. Code Ann. § 75-10-711(8) where DEQ had already issued a notice letter to BNSF for the KPT site;

5. Whether the trial court erred in determining that BNSF, a common carrier, was jointly and severally liable as an "arranger" for contamination at the Reliance site by virtue of its (or its predecessors) shipment of petroleum and other products to Reliance (February 10, 2009, Findings of Fact, Conclusions of Law, and Order);

6. Whether the trial court erred in failing to apportion liability for remediation on the KPT site by and between BNSF and KPT (November 5, 2007 Order on Various Motions);

7. Whether the trial court erred in applying the standard articulated in *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 933 (9th Cir. 2008), subsequently overruled, to BNSF's defense of apportionment (February 10, 2009, Finding of Fact, Conclusions of Law, and Order).

**THE CROSS-APPELLANT FURTHER CERTIFIES:**

1. That this cross-appeal is not subject to the mediation process required by M. R. App. P. 7.

2. That this cross-appeal is not an appeal from an order certified as final under M. R. Civ. P. 54(b).

3. That the notice required by M. R. App. P. 27 is not applicable to this action.

4. That all available transcripts of the proceedings in this cause involving the issue(s) cross-appealed have been ordered from the court reporter prior to or contemporaneously with the filing of this notice of cross-appeal.

5. That included herewith is the filing fee prescribed by statute.

Dated this 28<sup>th</sup> day of September, 2009.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

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Chad E. Adams

Attorneys for BNSF Railway Co.

## CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing *Notice of Cross-Appeal* with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing *Notice of Cross-Appeal* upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

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